IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SECOND APPEAL NO.1406 OF 2005

Sambha Dhondi Jorwar (Patil)
And Anr. .. Appellants.

Versus

Narayan Dhondi Jorwar & Ors. .. Respondents.

Mr.Surel S.Shah for appellants.
Mr.K.B.Sonwalkar for respondent Nos.1 and 2.

CORAM : S.C.DHARMADHIKARI, J.
DATE : 3rd September 2007.

P.C.

. The appellants, original plaintiffs are in Second Appeal, to challenge the Judgement and

order of the lower appellate court confirming that of the trial court, dismissing their suit.

2. The Substantial question of law, according to Mr.Shah would be that the predecessor in title of the respondents one Dhondi was of advanced age. He was over 90 years when the suit land Gat No.232 was allegedly transferred in the name of respondent No.2. He submits that the deposition of the appellants - plaintiffs would show that the deceased Dhondi was not keeping good health and in fact never understood implications of his acts and deeds. Fathers of appellants and the original defendants were cultivating the suit land jointly. There is material to show that the land has been acquired out of joint family income and mere mutation entry would not evidence transfer of the lands in favour of respondent No.2 by the deceased. In such circumstances and when the so called entries have not been proved, the transfer would not be

binding upon the appellants. Consequently, the courts were in error in dismissing the suit.

3. The courts below have concurred on the issue of the appellants proving that the original defendants have managed to get their names entered in the records by practicing fraud. Such fraud is not proved, is the conclusion. According to respondents - original defendants, there is ample material to show that the subject property was the self-acquired property of deceased and, therefore, no grievance could be made by the appellants, much less, after more than three years of the mutation entry.

4. It has come on record that the subject land was acquired by the deceased by tendering the consideration/price and obtaining necessary certificate under section 32M of the Bombay Tenancy and Agricultural Lands Act, 1948. It is true that Gat Nos.226 and 244 were partitioned

amongst all of them but the suit land was not partitioned. It is alleged that father died in the year 1967 and the original defendant No.1 with intent to grab land, illegally transferred the said land to defendant No.2 by practicing fraud on the father. At the time of death, the deceased was about 95 years of age. The allegation is that prior to his death, he was unconscious and was not aware of what was going around. However, courts below have observed that mutation entry No.183 was effected on 8th February 1985. The other mutation entries were also produced. The courts below have observed very clearly that apart from the statements which have been made orally, there are no documents to prove the alleged fraud. On the other hand, as has been rightly observed by the lower appellate court that mutation entry No.183 was sanctioned in the name of respondent No.2. It is an admitted position that no objection was taken regarding this entry from 1985 to 1988.

Although, it can be assumed that Appellant No.1 did not have knowledge of the said entry till 1988, however, his father also has not taken any objection to the transfer during his life time.

5. There is no objection raised inasmuch as Dhondi expired on 23rd May 1983 and suit came to be filed in the year 1988. The version that fraud was practised, according to lower appellate court gets falsified by plaintiffs own witness. He deposed that two years prior to the death of Dhondi, he gave the suit land to original defendant No.2. Dhondi during his life-time and the appellants, thereafter, did not object to the said transfer. Thus, there is substance in the contention that the transfer was unobjected through out. Further, against this mutation entry, no proceedings were initiated. Either the deceased Dhondi or his sons would have taken appropriate steps/proceedings challenging this entry. Once the lower appellate court observed

that mutation entry goes unchallenged asno proceedings are initiated, that the land is not joint family property, then, based upon the above circumstances which are culled out from the oral and documentary evidence placed on record, the suit is rightly dismissed.

6. In my view, there is no perversity inasmuch as the findings are consistent with the oral and documentary evidence. This is not a case where re-appreciation and re-appraisal of the materials would be permissible by this Court. Consequently, it is not possible to uphold the Argument of Mr.Shah that the mutation entry alone would not evidence transfer and that inaction on the part of parties to challenge the same should not deprive them of their share in the property.

7. In the light of the concurrent findings, I see no merit in the appeal and is accordingly dismissed.

(S.C.DHARMADHIKARI, J)